

White officers at EJSP sold the T-Shirts in question. The T-Shirts had on them the picture of the Chief with the caption "Support Our Leader". These T-Shirt sales occurred immediately after both Petitioners gave statements to the public at large as to racial discrimination and retaliation existing at EJSP. (See EED May 23, 1999 Report).

When Petitioners complained to EED as to these T-Shirt sales and the adverse impact that these sales were having as to racial tension at EJSP, the Petitioners, without any input on their behalf, were simply transferred out of EJSP to other facilities within the State of New Jersey.

EED issued its investigative report on this matter on May 23, 1999, which contained in its summary that the two Petitioners "are victims of a hostile work environment by virtue of the timeliness of the tee shirt sales alone." The EED report concluded that the two Petitioners have a right to a safe work environment. It is important to note that nowhere in the record is it contained that EED recommended a transfer *without* Petitioner's input.

As set forth in the EED Complaint as to an incident of March 26, 1999, the Petitioner Leak stated that he was the victim of retaliation when a video camera was pointed into his direction where he was working, as opposed to being directed towards the inmate population in the Mess Hall. Petitioner Leak was then accused, by his supervising officers, of sleeping. He was the subject of a disciplinary hearing, where he received a written reprimand. Petitioner disputed the allegations as to the supervisors. (See Appeal of Minor Disciplinary Action) (See EED Complaint).

It is a question of fact as to whether one is to believe the Petitioners' position as to the allegations contained in both the EED Complaints and Civil Complaint as to the hostile

work environment and retaliation. It is important to look at the totality of the circumstances and the resulting impact upon the Petitioners. The Trial Judge erred when he imposed his own beliefs into this litigation and made Findings of Fact as to issues to be determined by a Jury. The Opinion of the Third Circuit further narrowed what constitutes an adverse work environment and retaliatory actions by an employer.

REASON FOR GRANTING THE PETITION

The Opinion of the Third Circuit in the case *sub judice* essentially is further restriction as to what constitutes an adverse employment action under *Weston v. Pennsylvania*, 251 F.3d 420, 430 (3d Cir. 2001). The present Opinion does not take into consideration the totality of the circumstances as to the Petitioners' employment.

To bring an actionable claim for . . . harassment because of an intimidating and offensive work environment, a plaintiff must establish 'by the totality of the circumstances, the existence of a hostile or abusive working environment. . . .

West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995), quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990). See also *Kent v. Hendersen*, 77 F. Supp. 2d 628, 631 (E.D. Pa. 1999); *Knabe v. Boury Corp.*, 114 F.3d 407, 410 (3d Cir. 1997); *Iadimarco v. Runyon*, 190 F.3d 151, 163 (3d Cir. 1999).

The totality of the circumstances is that Petitioners are members of a protected class in that they are African-Americans, who were subjected to a hostile work environment which ultimately led to a variety of retaliatory

actions by the Respondents. The Respondent's actions constitute adverse employment actions.

It is Petitioners' position that there was a severe pervasive harassment as to their employment, in that the Respondent was an informed employer who took no effective measures to stop the conduct and, as such, sent a message that the harassment was acceptable and that the management supports the harasser. (Cf., *Blakey v. Continental Airlines, Inc.*, 741 A.2d 94, 164 N.J. 28 (2000)).

The Court in *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001), referred to a number of cases in which one must look at the totality of events:

[A] discrimination analysis must concentrate not on individual incidents, but on the overall scenario. *Durham Life Ins. Co. v. Evens*, 166 F.3d 139, 149 (3d Cir. 1999) (quotations omitted); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) ("Whether an environment is 'hostile' . . . can be determined only by looking at all the circumstances."). Title VII applies to both "facially neutral mistreatment . . . [and] overt [ethnic] discrimination . . . [which] in sum constitute [] the hostile work environment." *Id.* at 148; [FN6] See also, *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-84 (3d Cir.) (discussing the increased sophistication of modern violators, the obligation of courts to be "increasingly vigilant" against subtle forms of discrimination, and the importance of allowing plaintiff to prove discrimination indirectly: "[i]n

light of the suspicious remarks [arguably racial slurs] . . . , a reasonable jury could interpret [facially neutral] behavior as part of a complex tapestry of discrimination”).

A review by the Supreme Court is warranted since the Third Circuit did not look at the totality of the circumstances when it determined that Petitioners were not subjected to an adverse employment action by the Respondents. This Opinion of the Third Circuit removes the analysis of totality of the circumstances from claims alleging a hostile work environment and retaliatory conduct by an employer.

As set forth in the Complaint, Petitioners witnessed various incidents of racial discrimination and hostile work environment. When they reported these incidents, they were subjected to retaliatory action by Respondents.

One such retaliatory action was the involuntary transfer of the Petitioners from EJSP to other facilities within the State, when Petitioners filed EED Complaints as to the T-Shirt sales at EJSP.

The language of *Robinson v. City of Pittsburg*, 120 F.3d 1286, 1300 (3d Cir. 1997), cited by the Third Circuit in its Opinion, was that conduct by an employer qualifies as an adverse employment action only if it is “serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment.” The Third Circuit in its Opinion relied upon *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996), in that purely lateral transfers do not rise to the level of a materially adverse employment action.

The Third Circuit failed to take into account that this was *not* a purely lateral transfer. Petitioners were relocated to other locations within the State. Petitioner Dennis was transferred from EJSP in Woodbridge, New Jersey to Northern State Prison in Newark, New Jersey. Petitioner Leak was transferred to Mountainview Prison in Annadale, New Jersey. The distances are 18 to 39 miles, respectively, from EJSP.

The location of the transfer is essential as to whether it is a lateral transfer. This is a material change in the terms of one's employment. For many individuals, location of one's employment is more important than pay or rank.

The Opinion of the Court in this matter, further erodes what constitutes an adverse employment action and retaliatory conduct by an employer, and the criteria of what is serious and tangible enough under *Robinson* and *Williams*. Essentially, the only criteria that remains is the impact upon an employee's compensation. This Opinion creates a new and restrictive standard as to what qualifies as an adverse employment action, removing "conditions and privileges" of employment as factors which constitute an adverse employment action.

In another incident as to retaliatory conduct by Respondents, Petitioner Leak stated that he was the victim of retaliation when a video camera was pointed into his direction in the Mess Hall where he was working at EJSP, as opposed to being directed towards the inmate population in the Mess Hall. Petitioner Leak was then accused, by his supervising officers, of sleeping. He was then the subject of a disciplinary hearing, where he received a written reprimand but not as to the allegation of sleeping but as to improper

use of a security key. (See EED Complaint). The Trial Court held that as a matter of law that the Petitioner was properly disciplined for his failure to be vigilant on the job. The Third Circuit improperly erred when it affirmed the Trial Court's dismissal of this claim.

Pursuant to *Weston, supra*, the Petitioner met the required standard of an adverse work environment in that the Petitioner was in fact the subject of discipline by the Defendants. It is for the Trier of Fact to determine the underlining facts as to whether the Petitioner was properly disciplined and whether or not Petitioner was vigilant on the job.

The Court's Opinion virtually removes the totality of the circumstances criteria and permits a Trial Judge to make findings of fact as to all issues including credibility as to this retaliatory disciplinary action. The Third Circuit has now adopted a new standard as to credibility in Civil Rights litigation with the Trial Judge now deciding credibility issues. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are Jury functions, not those of a judge, whether he is ruling on a Motion for Summary Judgement or for a direct verdict.); *see also Rocco v. New Jersey Transit Rail Operations, Inc.*, 749 A.2d 868, 330 N.J. Super. 320, 334; *Reisman v. Great American Recreation, Inc.*, 628 A.2d 801, 266 N.J. Super. 87, 99 (App. Div. 1993), *quoting Nobero Co. v. Ferro Trucking, Inc.*, 258 A.2d 713, 107 N.J. Super. 394, 404; *D'Amato by McPherson v. D'Amato*, 701 A.2d 970, 305 N.J. Super. 109, 115 (App. Div. 1997).

As to the pendent claims, the Third Circuit affirmed the Trial Judge's misapplication of the State law set forth in *Shepherd v. Hunterdon Developmental Center*, 765 A.2d 217, 336 N.J. Super. 395 (App. Div. 2001). The Court in *Shepherd*, actually held that it was a material issue of fact as to whether the supervisors/employer created a hostile work environment, as follows:

It is the harassing conduct that must be severe or pervasive, not its effect on the employee or the work environment. *Lehmann, supra*, 132 N.J. at 606, 626 A.2d 445. The conduct must be severe enough to make a reasonable person in the protected group believe that the conditions of work have been altered and that the environment is hostile or abusive. *Taylor v. Metzger*, 152 N.J. 490, 506, 706 A.2d 685.

Moreover, by using the disjunctive requirement of "severe or pervasive," *Lehmann* recognized that many plaintiffs claiming a hostile work environment allege numerous incidents that, if considered individually, would not be sufficiently severe to make the work environment intimidating or hostile. *Lehmenn v. Toys 'R' Us, supra*, 132 N.J. at 607, 626 A.2d 445. The severity or seriousness of the conduct may vary inversely with the pervasiveness or frequency of the conduct, and, therefore, the Court "must consider the cumulative effect of the various incidents." *Ibid.*

In *Shepherd*, the Court held that it must accept Plaintiffs' allegations as true for the purpose of the Summary Judgment Motion and when viewed in that light, Plaintiffs have established a factual dispute as to a hostile work environment. *Id.* at 418.

It is respectfully submitted that the allegations of the Petitioners should have been permitted to go to the Jury and have not dismissed the matter without the totality of the circumstances analysis. The Jury would have been told to assess whether Petitioners made a persuasive showing of unlawful discrimination and that it may use its' disbelief of Respondent's explanation in making that determination, *i.e.*, that in essence the Jury is to make considered judgment on the ultimate question based on all evidence before it without assistance of presumption. *Mattiello v. Grand Union Co.*, 754 A.2d 563, 333 N.J. Super. 12 (App. Div. 2000), *cert. denied*, 762 A.2d 658, 165 N.J. 677 (2000).

As previously stated, the Opinion of the Third Circuit has now resulted in employees having less rights than the standard set forth in *Weston* and *West*, and the companion State of New Jersey Court standard enumerated in *Shepherd*. The Third Circuit Opinion sets the standard that one's rights have been violated only in circumstances that have a direct monetary impact on the employee. Employers will be able to use disciplinary hearings as a pre-text to conduct retaliatory acts upon an employee and so long as it does not impact one's monetary position, those actions do not constitute an adverse employment action.

Further, the Third Circuit Opinion permits an employer to retaliate against an employee, by way of transferring the employee from one location to another, so long as the salary remains the same. As set forth previously, the location of one's employment is often more important than the salary one receives.

A review by this Court is warranted to return the standard to be not only monetary impact on an employee, but also that location of one's employment, is a significant condition or privilege of one's employment.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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